UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BELLAGIO, LLC **Employer,** **and** **INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501,** **Petitioner.**	**Case No. 28-RC-154081**

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Bellagio, LLC ("the Employer" or "Bellagio"), pursuant to Section 102.67(c), requests that the Board review the Decision and Direction of Election ("DDE") issued by the Regional Director of Region 28 on June 30, 2015. Review is warranted for three reasons.

First, the Regional Director's decision to process the International Union of Operating Engineers Local 501's ("Petitioner" or the "Union") June 12, 2015 Petition ("Petition") to represent three Surveillance Technicians and direct an election violated the Board's recently amended Representation Case Procedures Rules and Regulations. Section 102.61(a)(8)'s meaning is plain and unambiguous: a petition for representation "*shall contain* … a statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act."

There is no dispute that the Petition did not comply with Section 102.61(a)'s mandatory requirements. The relevant portion of the Petition was left blank, and during the hearing, the Union neither amended the Petition so that it would be complete, nor submitted any evidence which could establish that it complied with the substantive requirements of the rule. As such, the Petition violated the Board's Rules and Regulations and should have been dismissed. The Regional Director's decision to direct an election notwithstanding this unexcused violation of the Board's Rules and Regulations resulted in a denial of due process. *See United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (holding that an administrative agency's failure to comply with its own rules is a violation of due process).

Second, the Regional Director incorrectly applied Section 9(b)(3) of the Act. He should have found that the Surveillance Technicians are "guards" and that the petitioned for bargaining unit is therefore inappropriate because the Union represents non-guard employees, including non-guard employees at The Bellagio.

Circumstances have changed in the three decades which have passed since the Board issued its decision in *MGM Grand Hotel*. The hotel casino security environment has been transformed. Casinos no longer rely exclusively on posted surveillance personnel and security guards to protect patrons and their property. The surveillance employees who walked the catwalks with binoculars above the gaming floor, significant numbers of guards who used to roam the facility, and antiquated alarm devices have been replaced by high tech closed circuit television (CCTV) systems and a sophisticated electronic access control system which governs

the alarm system and electronic door locks protecting the casino cage, the soft count room and the other most sensitive areas in the hotel.[1]

The Surveillance Technicians have sole and exclusive responsibility for all of these things. They install, sight, monitor, and control every camera on both the Surveillance *and* the Security Department's CCTV systems. Surveillance Technicians also have sole and exclusive responsibility for the Bellagio's electronic access control system, which includes both its alarm system (such as the alarms on jewelry cases in its high end watch store) as well as any door which is secured by an electronic lock. To that end, they also have sole and exclusive responsibility for issuing all electronic access keys, including the keys which access the soft count room,[2] the Server Room (which functions as a Surveillance Technician work area and which is the nerve center for both the Security Department and the Surveillance Department CCTV systems), and other similar sensitive areas.

Finally, Surveillance Technicians play a critical role in the confrontation of employees and guests who are suspected of misconduct. It is undisputed that a substantial portion of their duties involve the installation of covert cameras which are targeted at specific employees suspected of misconduct, use their CCTV system administrative privileges to secretly "lock" cameras so that the camera is focused on particular dealers or patrons suspected of malfeasance, limit camera access to individuals who are suspected of misconduct, and physically escort

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[1] The Regional Director appeared to contend that the Surveillance Technicians are not guards because the Bellagio has a "separate security department." DDE at 9. This is disingenuous. First, the evidence is undisputed that the Surveillance Technicians have dual responsibility to the Security Department. They work in the Security Department monitor room every day, hand in hand with security officers and supervisors, and take direction from the Vice President of Security in the course of performing special operations. Second, the record indicates that the Surveillance and Security Departments perform overlapping functions but are distinct because Nevada gaming control regulations require them to be so. *See* ERX 1. The issue is to ensure that employees with responsibility for protecting the integrity of the gaming operation are within a distinct department.

[2] The soft count room is where all cash (as opposed to coin) on the property is collected and counted. By way of explanation, if $100 is exchanged for chips at a black jack table, the $100 bill is delivered to the soft count room where it is counted and then delivered to the casino cage which is the Casino's bank.

individuals who need to have access to the Server Room. Like the work referenced above, *no one else* at the Bellagio can perform this work, and the evidence is *undisputed* that neither the Security Department nor the Surveillance Department can perform their functions – securing the hotel casino and enforcing rules against employees and patrons – without the Surveillance Technicians. The extraordinary amounts of cash moving throughout the property cannot be safeguarded without the CCTV systems and the Surveillance Technicians' ongoing vigilance.

The Board considered a similar group of employees in *MGM Grand Hotel*, 274 NLRB 139 (1985). There, the Board deliberated over whether technicians who installed and maintained an electronic fire-protection system were guards within the meaning of the Act. Noting the nature of the hotel casino environment, the Board rejected the union's objections that the technicians did not carry weapons or confront wrongdoers directly, and held that the technicians "are as closely involved in protecting the Employer's property and enforcing security as are Employer's plainclothes officers and uniformed guards." *Id.* It explained that the technicians were "intimately involved in the security functions and life-safety procedures at the Employer's establishment" and concluded that the technicians were guards within the meaning of Section 9(b)(3). *Id.*

The undisputed evidence in this case is far stronger. The Surveillance Technicians represent, in every way, the natural evolution of the guard function in the modern casino environment. They literally are the gatekeepers for each of the Bellagio's electronic security and surveillance systems. In determining surveillance coverage, maintaining the integrity of the system, granting or restricting access, and performing all of the work described above and in more detail below, they are directly responsible for enforcing rules and protecting property. The systems are indispensable to the Bellagio's ability to operate as a casino because it cannot secure

and safeguard patrons, employees and property without them; and, the systems cannot be operated or secured without the Surveillance Technicians.

The overriding purpose of the Section 9(b)(3) of the Act is to protect both employers and employees from a situation where an employee is subject to a conflict of interest. *See, e.g., NLRB v. Brinks, Inc. of Florida,* 843 F.2d 448, 453 (11th Cir. 1988) (Congress enacted section 9(b)(3) to alleviate "not merely divided loyalties at a company plant, but the potential for divided loyalty that arises whenever a guard is called to enforce the rules of his employer against any fellow union member.") (quotations omitted). Where, in the event of a strike or other disputes between the employer and the union, the employment relationship is compromised because the employee's obligation to their employer and the community is incompatible with the duty that the employee owes to his union.

It is undisputed that the Surveillance Technicians would be subject to these competing interests. Nevada Gaming Control Board regulations recognize the inherent potential for such conflict by requiring that Surveillance employees who are responsible for maintaining the integrity of the gaming enterprise, including Surveillance Technicians, are kept distinct from other worker classifications. Moreover, no other employees, including the respective Directors of Security and Surveillance, play an equivalent role in the Company's security and surveillance operations. As the Vice President of Security explained, Surveillance Technicians would be an integral part of his efforts to plan for a strike. And, as discussed above, a significant aspect of the Surveillance Technician's job duties is the installation of covert cameras and other covert

activities where the Surveillance Technicians share in direct responsibility for policing employee conduct.[3]

Third, and finally, review is warranted because the Regional Director should have concluded that the Surveillance Technicians are "confidential" employees. *See NLRB v. Hendricks County Rural Elec*., 454 U.S. 170 (1981). They act in a confidential capacity to persons who exercise managerial functions in the field of labor relations. They are directly and inextricably involved in the Company's efforts to investigate potential employee misconduct, working directly with Human Resources and the Company's General Counsel in investigating suspected malfeasance. *Id.* at 191. The evidence is also undisputed that the Surveillance Technicians are responsible for devising and implementing surveillance and security strategies throughout the casino, actively maintaining and effectuating confidential strategies designed to safeguard property from employee misconduct. This connection to employee misconduct is sufficient to satisfy the "labor nexus" test utilized by the Board, and the Regional Director erred in finding otherwise.

Accordingly, the DDE warrants review under Section 102.67(c) because (1) a substantial question of law and policy is raised by the Regional Director's departure from Board law, (2) the Regional Director's decision resulted in a prejudicial error, and finally (3) to the extent that the

[3] The Regional Director's attempted to deflect the significance of the Surveillance Technicians' access by asserting that there was no evidence that it had been misused in the past. DDE at 9. That contention is contrary to Board law. The crux of the Board's determination is the *potential* for divided loyalties: the possibility that an employee will take contrary to the employer's interests in the heat of a dispute or when subjected to pressure by his fellow union members. Proof of past misconduct is not required. The Regional Director's reasoning is also based on assumptions that are contrary to the record. As the witnesses explained, the Bellagio would have no way of knowing whether a Surveillance Technician had abused his privileges in the past. Finally, the Regional Director downplayed the significance of the Surveillance Technician access by asserting that it is not "plenary" and that misuse of access privileges would be subject to discipline. DDE at 4. The factual basis for that claim is incorrect. The Surveillance Technicians do not need permission to grant or change any person's access rights. And, the fact that a Surveillance Technician would be subject to discipline for misuse is a non-starter. That is always the case for a guard who compromises his loyalty to his employer in order to protect a member of the union or assist the union in its efforts to pressure an employer during a dispute.

Regional Director concluded that current Board precedent regarding Section 9(b)(3) is insufficient to show that the Surveillance Technicians are guards under the Act, there are compelling reasons for reconsideration of the Board's rules and policies.

II. STATEMENT OF FACTS REGARDING THE INSUFFICIENCY OF THE PETITION

A. The Petition Is Incomplete. Section 7 Is Blank, And It Does Not Otherwise Contain A Statement Satisfying The Requirements Of Section 102.61(a).

The Union filed the petition with Region 28 on June 12, 2015. *See* Bd. Ex. 1. The Union left Section 7 of the petition blank, failing to state whether it had or had not requested recognition from the Respondent. *Id.* As was set forth in the Bellagio's June 16, 2015 Motion to Dismiss, the first contact that anyone at the Bellagio had with the Union regarding the petition occurred on June 12, 2015 when the Union emailed a copy of the petition to Beth Foster, the Bellagio's Director of Human Resources. *Id.* The Union did not request that the Employer recognize it as the bargaining representative of the petitioned for unit prior to filing the Petition. *Id.*

B. The Bellagio Moved To Dismiss The Petition And, Because The Regional Director's Order Denying The Motion Did Not Address The Substance Of The Bellagio's Argument, Restated That Motion In Its Statement Of Position.

On June 16, 2015, the Bellagio moved to dismiss the Petition because the Union had not supplied the information required by Section 102.61(a). The Regional Director denied the Motion on July 12, 2015. He recognized that Section 102.61(a)(8) "describes the contents that *must* accompany a petition for certification at the time of service[.]" 6/12/2015 Order at 2 (emphasis added). The Regional Director's Order Denying the Motion to Dismiss did not address the Union's failure to provide the information mandated by the Board's Rules and Regulations, however. He simply found that a request for recognition is not required. *Id.* As

such, Respondent referenced the Motion to Dismiss in its June 19, 2015 Statement of Position, and put the Union on notice that it intended to reassert its argument at the hearing. *See* Board Ex. 2(d) (R. Stat. of Pos. at 4).

C. The June 23-24, 2015 Hearing

The Region conducted a hearing regarding the Petition on June 23-24, 2015.[4] The Petition was introduced as Board Ex. 1.[5] After noting that the Petition remained defective, Respondent once again moved to dismiss the Petition. Tr. 20-22. When asked for a response to the Petition's inadequacy, the Union indicated that it had none.[6] Tr. 22; 23-25.

D. The Regional Director's Decision And Direction Of Election.

The Regional Director issued his Decision and Direction of Election on June 30, 2015. He once again observed that that Section 102.61(a)(8) "describes the contents that *must* accompany a petition for certification at the time of service[.]" DDE at 2 (emphasis added). Although the Union did not amend the Petition or explain why it had not provided the mandatory information, the Regional Director once again rejected Respondent's argument and directed that an election be held seven days later. In addressing the insufficiency of the Petition, he also once again made no effort to explain how the mandatory language of the regulation, could be reconciled with processing the Petition. The Regional Director merely contended that a "strictly

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[4] The hearing was conducted seriatim with other cases which were filed on the same day involving other hotel casinos. Because the hotel casino surveillance and security environment at different properties, this case and request for review is similar to the request for review filed in 28-RC-154083.

[5] During the hearing, the Union made a belated request for recognition. Tr. 9. It did not, however, seek to amend the Petition. *Id.* Given the plain language of Section 102.61(a)(8), the Union's request did not satisfy the Board's requirements. More importantly, even after making this request, the Union knowingly failed to amend the Petition, meaning that the document remains incomplete and in violation of Section 102.61(a)(8)'s mandatory requirements.

[6] The Union's representative asserted that "we didn't receive a response" but he did not offer that statement under oath as Section 102.61(a) requires. Tr. 23-25. In fact, he specifically declined to do so. *Id.*

literal interpretation" of Section 102.61(a) was contrary to Board law under *Advance Pattern Co.*, 80 NLRB 29, 31-38 (1948).

III. THE BELLAGIO'S REQUEST FOR REVIEW SHOULD BE GRANTED. THE PETITION SHOULD HAVE BEEN DISMISSED BECAUSE IT DOES NOT COMPLY WITH SECTION 102.61(a) OF THE BOARD'S RULES AND REGULATIONS.

A. Section 102.61(a) Mandates That The Petition Contain A Statement That The Employer Has Declined To Recognize The Union Under Section 9(a) Of The Act.

Section 102.61(a) of the Board's Rules and Regulations sets forth the requirements for RC petitions.[7] It provides in relevant part:

> Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.
>
> (a) *RC Petitions.* A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, ***shall contain the following***:
>
> …
>
> (8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

§ 102.61 (emphasis added).

Section 102.61(a)'s use of the phrase *shall contain* "indicates an intent to impose discretionless obligations." *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 400 (2008). Put another way, the requirement of Section 102.61(a)(8) must be satisfied or the petition is invalid. The Board's newly adopted petition form – Form NLRB-502 (RC) – effectuates that mandate. Section 7 requires the petitioner to record the actual date on which recognition as Bargaining

[7] It is important to note that Section 9(c)(1) of the Act specifically provides that petitions must be filed "in accordance with such regulations as may be prescribed by the Board[.]"

Representative was requested as well as the date on which the Employer declined representation (or failed to answer).

In this case, there is no dispute that the petition does not satisfy the mandatory obligations imposed by Section 102.61(a). The petition does not include a "statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a)." The Union left Section 7 of the petition completely blank and failed to ever request that the Employer recognize it as the representative of the petitioned for unit. Indeed, the Union refused to amend the petition. And, when confronted with the option of correcting the petition and presenting evidence, the Union's representative declined to go under oath and offer testimony or other evidence which might establish compliance with Section 102.61(a).

It is conceivable that an argument could be made that the Union's blatant failure to comply with Section 102.61(a) can be excused. That conclusion, however, is not permitted by the language in the Board's Rules and Regulations. Several other sections of the Board's newly adopted representation regulations use the word "shall" to denote mandatory obligations, including the sections pertaining to the voter list, the Notice of Election and the statement of position.[8] As the Supreme Court has noted, "identical words used in different parts of the same act are intended to have the same meaning." *Atlantic Cleaners & Dyers v. United States*, 286

[8] For example, Section 102.60 provides that a petition "*may* be filed by any employee or group of employees or any individual or labor organization acting in their behalf." (emphasis added). It also provides that "[p]etitions under this section *shall* be in writing and signed, and either *shall* be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or *shall* contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746)." Section 102.62(d), which establishes the requirements for the voter list similarly provides that the employer "*shall* provide to the regional director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular (''cell'') telephone numbers) of all eligible voters. The employer *shall* also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote[.]" Section 102.62(e), which concerns the notice of election, uses the word shall repeatedly including in the sentences which provide "The employer *shall* post and distribute the Notice of Election in accordance with § 102.67(k)."

U.S. 427, 433 (1932). In drafting and adopting the amended representation election rules, the Board used the word *shall* to signify a *mandatory* obligation. If the Board were now to hold that compliance with the mandatory language of Section 102.61(a) was not obligatory, it would be required to find that Sections 102.62(d) (voter list), 102.62(e) (Notice of Election), and 102.63 (Notice and Statement of Position) are also permissive. The language of the regulation does not permit a different result.

B. The Regional Director's Decision And Direction Of Election Was Arbitrary And Capricious.

The Regional Director made no effort to interpret the wording of Section 102.61(a). In fact, in the DDE, the Regional Director unwittingly confirmed the plain meaning of the regulation when he reasoned that the provision "describes the contents that *must* accompany a petition for certification at the time of service[.]" DDE at 2 (emphasis added). Without a textual basis for his conclusion that the Union could escape Section 102.61(a)'s mandatory requirements, the Regional Director relies completely on his contention that holding petitioners to the requirements of Section 102.61(a) is inappropriate because it will lead to "the atmosphere of a tensely litigated law suit in which all sides will be quick to seize upon technical defects in pleadings to gain substantive victories." DDE at 2 (quoting *Advance Pattern Co.*, 80 NLRB at 35).

The Regional Director's reasoning is arbitrary and capricious. The plain meaning of a duly adopted regulation cannot be jettisoned due to individualized concerns over potential litigation. The wisdom of the regulation and its potential for spurring challenges regarding technical compliance with its provisions is *precisely* what is supposed to be considered during the notice and comment period of the rule making process – a fact made clear by the extensive discussion contained in the materials accompanying the Board's Final Rule. *See* Federal

Register Vol. 79, No. 240 at 74308 (background on rulemaking). Although the Final Rule contains a lengthy explication of Section 102.61 and its various *mandatory* requirements, there is no discussion whatsoever of the potential for frivolous litigation resulting from technical noncompliance. *Id.* at 74328-10. Nor is there any discussion suggesting that the Final Rule grants the Board or the Regional Director discretion to excuse complete failure to satisfy any of the Final Rule's obligations. *Id.*

Even if one assumed that the Regional Director's anxiety over the potential for litigation was entitled to some weight despite the clear language of the regulation, there should be little doubt that his concern is overstated. Completion of the petition requires nothing more than filling out a one page form containing thirteen boxes seeking basic information. *See* FORM NLRB-502 at sections 1-13(e). Petitioners, including unions and their organizers, have both the experience with Board procedures and the wherewithal to complete the form accurately. Because the form is signed under penalty of perjury, one would expect that it would be reviewed with care and that the necessary information would be provided or its absence would be explained. This case, which involves a recalcitrant petitioner who not only failed to complete the Petition but who also has refused to correct or even seek to amend its Petition, demonstrates how infrequently litigation will actually arise.

Any concern about litigation over technical compliance with pleading-type requirements is also artificial. As noted above, the Final Rule is replete with newly adopted "pleading requirements" which, if violated, will have a dramatic effect on the responding party's rights which cannot be ameliorated by simply filing an amended petition as the Union could have done in this case. The sections of the Final Rule which concern the provision of the voter list, the Notice of Election and the statement of position all provide that technical noncompliance will

minimize or even preclude the employer from presenting substantive arguments or evidence. "The Final Rule treats the employer Statement of Position like a formal pleading, binding on the employer as both admission and limitation … virtually precluding subsequent changes in position and subject to restrictive standards regarding amendment. The Final Rule provides no rational basis for the imposition of such one-sided and onerous requirements with such severe consequences attendant on any failure to meet them." Federal Register, Vol. 79, No. 240 at 74443.

The information required by Section 102.61(a)(8), a statement regarding whether the petitioner has requested voluntary recognition, is derived from the language of Section 9(c)(1) of the Act. It serves a useful purpose, putting employers on notice that the Union likely represents a majority of the petitioned for unit and potentially streamlining pre-election hearings or even dispensing with the need for any Board involvement whatsoever. It was rational for the Board to adopt the regulation and make satisfaction of its requirements necessary before further processing of the petition is permitted. The Regional Director's disregard for the section's requirements due to his consternation over the hypothetical potential for litigation was arbitrary and capricious and warrants Board review.

C. The Regional Director And The Board Are Bound To Comply With The Board's Own Regulations, And Failure To Do So Would Violate Due Process.

There can be no dispute that the Petition does not comply with Section 102.61(a). There also can be no dispute that the Regional Director's DDE contravenes the regulation's text. Although the Regional Director concluded that disregard for the regulation's plain meaning could be justified on policy grounds, this was arbitrary and capricious. Procedural due process requires the government to adhere to its own rules. *United States ex rel. Accardi v. Shaughnessy*,

347 U.S. 260 (1954). As the Ninth Circuit has explained:

> When administrative bodies promulgate rules or regulations to serve as guidelines, these guidelines should be followed. Failure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process.

NLRB v. Welcome--American Fertilizer Co., 443 F.2d 19 (9th Cir. 1971).

Once the Board has embraced a regulation, it "must live with its commitment." *Id.* In fact, the rules and regulations of an administrative agency are binding even when the action under review is discretionary in nature. *Service v. Dulles*, 354 U.S. 363, 388 (1959) ("While it is of course true . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, . . having done so, he could not, so long as the Regulations remained unchanged, proceed without regard to them."); *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (agency action void because the agency did not comply with its own procedure); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969) ("An agency of the Government must scrupulously observe rules, regulations or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.").

The Regional Director's DDE, as well as his reliance on *Advance Pattern Co.*, were therefore misplaced. First, *Advance Pattern Co.* was issued before the Supreme Court's decision in *Accardi*. Given that *Accardi* found that an agency's disregard for a validly promulgated administrative regulation is repugnant to due process – rejecting the exact reasoning relied upon by the Board - *Advance Pattern Co.* can no longer be considered good law. *See, e.g., New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002) (reliance on Board decisions without regard to intervening Supreme Court decision inappropriate). Second, *Advance Pattern Co.* did not survive the Board's reissuance of Section 102.61(a). Under *Chevron U. S. A. Inc. v. Natural*

Resources Defense Council, 467 U.S. 837 (1984), formal rulemaking which is subject to notice and comment procedures trumps adjudicative decisions. *See U.S. v. Mead Corp.*, 533 U.S. 218, 226-234 (2001). Because the Board chose against correcting the plain language of Section 102.61(a) when it was amended, and instead added additional items of information which are also deemed mandatory by the provision's text, the regulation must be applied and enforced as written. Doing otherwise violates Respondent's due process whereas the concomitant burden imposed on the Petitioner – refiling an amended version of the Petition – is negligible.[9]

Finally, extending the reasoning in *Advance Pattern Co.* is barred by modern Supreme Court precedent. Validly promulgated regulations like Section 102.61(a) cannot be amended through adjudicative decision making. To the contrary, as long as a regulation "is extant it has the force of law." *United States v. Nixon*, 418 U.S. 683, 695-696 (1974); *see also Bourjaily v. United States*, 483 U.S. 171 (1987) (recognizing that portions of *Nixon's* holding were abrogated by the amendment of Fed. R. Evid. 801). Thus, while it may be "theoretically possible for the [agency] to amend or revoke the regulation … so long as [the] regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." *Id.*

The Board consciously adopted the current form of Section 102.61(a) in the recently issued Final Rule, using the same mandatory language utilized in other sections of the Final Rule. The Final Rule was subjected to two different notice and comment periods and almost unparalleled scrutiny. The Board chose not to amend its text or enact a provision which would

[9] The Union may argue that the results of the election should not be set aside based on what it will doubtlessly describe as a technical mistake. The reasoning behind such an argument is not sound and would strip Respondent's right to due process of all weight. Had the Union and the Regional Director complied with Section 102.61(a), there would be no reason to do so. It is also clearly contemplated by the Final Rule, which eliminated the built in time for a party to seek review of a decision and direction of election and preserved a party's right to obtain such review even if the election had already taken place.

permit Section 102.61(a)'s requirements to be excused on a case by case basis. The Regional Director lacked the authority to grant such an exception in this case. In issuing the DDE, he deprived Respondent of due process, usurped the Board's responsibility for processing petitions under the Act and contravened the plain meaning of the Final Rule.

IV. STATEMENT OF FACTS RELEVANT TO THE SURVEILLANCE TECHNICIANS' STATUS AS GUARDS WITHIN THE MEANING OF SECTION 9(b)(3) OF THE ACT AND STATUS AS CONFIDENTIAL EMPLOYEES.

Although the Regional Director's summary of facts is generally accurate, there are a number of places where his discussion misrepresents, mischaracterizes, or omits facts which should have been considered. For the sake of efficiency, this statement of facts is, therefore limited to factual issues which were misrepresented, mischaracterized, or omitted.

A. Background On The Surveillance Department.

The Bellagio is a hotel casino operating on the Las Vegas Strip under the purview of the Nevada Gaming Control Board. Tr. 33-36 (discussing obligation to comply with gaming control regulations); 51-56 ERX 1; Gaming Control Regulations 5.160. In 2005, the Gaming Control Board adopted comprehensive surveillance regulations which set forth the Company's obligations to both establish and maintain a surveillance system in all gaming areas. *See id.*; ERX 1 and 2. (regulations); ERX 3 and 4 (Gaming Control submissions). Compliance with those regulations is absolutely required, and violations can result in the suspension of the Company's ability to operate certain games, certain areas of the casino, or in some cases, the ability to operate the casino at all. *Id.*

The Gaming Control Regulations require the Company to establish a surveillance plan, which must be approved by the Gaming Control Board. *Id.* They also require the Company to maintain a dedicated and independent Surveillance Department to ensure compliance with the

plan. *Id.* As the Company's Director of Surveillance explained, the purpose of this separation is to eliminate the possibility of conflicts of interest that can arise because surveillance employees, by their nature, are monitoring the activities of their coworkers and the casino's patrons. Tr. 47. They are key employees subject to a Level 3 background check (which is higher than security guards) because in the event a Surveillance Technician engaged in disloyal conduct, it could have a significant adverse impact on the business. Tr. 47.

The Surveillance Department, and by extension all employees working within the Surveillance Department, must protect the assets of the Company, safety of the employees and guests, and protect the legitimacy of the gaming enterprise. Tr. 30. This includes ensuring monitoring employee conduct to ensure that games are dealt properly, that the property's electronic surveillance system functions properly and gives appropriate games coverage, and protecting customers. *Id.*; Tr. 33-36; 56-57. Through the CCTV system, the Surveillance Department monitors ingress and egress to identify potential bad actors and to watch live games to ensure that dealers are dealing accurately and that patrons are not cheating. Tr. 39-42; 84-85. All of this work is accomplished exclusively through the use of the CCTV system. *Id*. The video feeds are monitored by Surveillance Operators who are responsible for observing, recording and reporting matters of interest.[10] *Id.*; 84-85; 144.

B. Surveillance Technician Work With The Surveillance Department.

The Surveillance Technicians are responsible for ensuring that the CCTV system is in compliance with Gaming Control regulations and that the view from any particular camera is adequate to protect people and property. Tr. 33-36; 51-55; 56-57. The Surveillance Technicians

[10] Under *MGM Grand Hotel*, the Surveillance Operators (like security officers stationed in their monitor room) are also clearly guards within the meaning of the Act, and the Surveillance Technicians intimate involvement with the Surveillance Operators and Security Officers' guard work demonstrates the propriety of finding that Surveillance Technicians should be deemed guards under Section 9(b)(3).

are solely responsible for establishing this coverage and communicate with the Gaming Control Board to ensure compliance. Tr. 51-55; ERX 4, 5. Each game requires a different set up, and the Surveillance Technicians work with Surveillance Operators and Surveillance Operators for a significant amount of time each day as they confirm system integrity, correct malfunctions, and ensure compliance. Tr. 51-57; ERX 4, 5. This work is accomplished from the Surveillance Department monitor room, where the Surveillance Technicians work continuously throughout their shift as well as in gaming areas where Surveillance Technicians install and maintain cameras. *Id.*

Surveillance Technicians are subject to oversight, but they use discretion to design and configure the surveillance scheme at any time, and play a particularly significant role when the Company remodels the facility or conducts special gaming events that are located off the casino floor. Tr. 51-55; 58-64; 71-75; ERX 4, 5. Special events take place at least twelve times per year, and tables are constantly being moved around the gaming areas. Tr. 60-67. Dustin Seibold, the Director of Surveillance, testified about the Surveillance Technicians' unique role in devising and implementing a surveillance strategy for specialized gaming events, such as high value baccarat tournaments, as well as for devising coverage for the casino cage. Tr. 71-83; 93; ERX 4, 5. Configuring these systems, which involves ensuring that the camera view is adequate to capture dealer actions and potential theft, is a significant part of the Surveillance Technicians' duties. *Id.*

The Surveillance Technicians are responsible for all of the Company's electronic access control systems, including alarm systems and electronically locked doors. Tr. 89-90; 94-99; 101-104; 108. In the case of alarm systems, they devise, install and investigate potential compromises of the system. *Id.* They also log the identity of each person who is given

electronic access and the places to which the individual has access. Tr. 108.

To accomplish these duties, the Surveillance Technicians have unique access and control over both the CCTV system and the electronic access control systems. In both cases, the Surveillance Technicians have "administrative access" or "Alpha Admin" access.[11] Tr. 58-63; 89-90; 101-104. The Regional Director appeared to misapprehend the significance of this remarkable power, but its significance cannot be overstated. The Surveillance Technicians are *prime movers* of the Company's surveillance and security operations. Tr. 237-240; 243-46. As Mr. Seibold explained, administrative access gives the Surveillance Technicians full access to the camera system. They can determine which cameras work and when, blacking out gaming areas, security areas or any other camera view at Bellagio. Tr. 58-63; 89-90; 101-104. They determine whether a camera records or not. *Id.*; 56-64. They determine whether an individual Surveillance Operator or an individual member of the Security Department can view any particular camera, or whether a camera has only limited access. *Id.*; 63-64.

Mr. Seibold gave a telling example of the Surveillance Technicians' role in devising and implementing a security and surveillance plan for the Bellagio Gallery of Fine Art. Tr. 94-99. During the recent remodel, the Surveillance Technicians established a coverage plan for the CCTV system, and also determined the types of alarms used to secure the extraordinarily valuable items housed in the Gallery of Fine Art, like Faberge eggs and Picasso paintings. *Id.* With respect to the Faberge eggs, they constructed and installed a unique "plunger" style alarm system that would be triggered if the glass cases housing the eggs was moved. *Id.* If such an alarm were triggered they would respond with Security to investigate. *Id.*; 130.

[11] The Director of Surveillance has equivalent access to the CCTV system (but lacks training and know-how). He lacks equivalent access to the access control system.

They alone determine who has access to video feeds. Tr. 58-64. Not even their Department directors can override them, and in fact, the surveillance technicians have the ability to eliminate any or all employees' ability to access any or all of the cameras. *Id.*; 237-40; 243-46. They also have the ability to turn off any notifications or alarms which are intended to alert the Surveillance Department that the CCTV or alarm systems are malfunctioning or disconnected. Tr. 139. In short, administrative access to the CCTV system means that a single Surveillance Technician can single-handedly defeat and compromise the Company's security and surveillance operations, give anyone a key that would allow them access any secured area, render the CCTV system totally or partially blind and remove any trace of the misconduct. *Id.*; 58-64; 237-40; 243-46; 253.

The Surveillance Technicians have sole and exclusive authority, through their administrative access, to modify digital storage, preventing the feed from any particular camera from having its feed recorded on the system. Tr. 237-40. They alone can delete digital files, meaning that they can erase any evidence of employee or patron misconduct and also cover up their tracks. *Id.* They alone control electronic access control, meaning they can give themselves or other employees access to sensitive areas. They are the only non-management employees who have access to the server room, meaning they have complete control over both the software on which the systems depend to operate, and the hardware. Tr. 44-45; 49; 89. Surveillance Technicians respond to equipment emergencies in the event an alarm or camera is defeated or malfunctioning. Tr. 130-31. They secure evidence of surveillance. Tr. 109.

Finally, as the Director of Surveillance explained, the Surveillance Technicians play a critical role in the Surveillance Department's efforts to investigate and police employee and/or patron misconduct. Tr. 104-106. Surveillance Technicians are solely responsible for the

installation or placement of covert cameras or otherwise "locking" certain kinds of cameras so that they focus on particular employees. *Id.* In both cases, the Surveillance Technicians also ensure that the video feed from these covert or locked cameras can be observed only by certain approved individuals. *Id.* Special investigations requiring new camera installation occur at least once a month, and special observations requiring the Surveillance Technicians to lock and limit access to particular cameras occur more frequently. *Id.* Contrary to the Regional Director's apparent belief, the Surveillance Technicians usually know the identity of the individual being investigated and the basis for the investigation. Tr. 104-106. In the event such an investigation was intended to remain confidential, even from other Surveillance Department employees, the Surveillance Technicians would be responsible for limiting Surveillance Operator access to video. *Id.*

C. Surveillance Technician Work For The Security Department.

The Bellagio Security Department's primary function is similar to that of the Surveillance Department: ensure safety and security of the property and investigate potential misconduct. Tr. 152. The Regional Director downplayed the direct role that Surveillance Technicians play in Security Department operations, and his effort to do so was not faithful to the record. The evidence at the hearing established that the Surveillance Technicians operate as an extension of the Security Department.

Surveillance Technicians have exclusive responsibility for the Department's CCTV system and electronic access control system. Tr. 155-58; 160; 164-165; 169-71; 221-223. Because the Security Department relies so heavily on its own CCTV system, the Surveillance Technicians are indispensable elements of the security force. *Id.* Although much was made of the fact that the Company's uniformed security officers do not install or maintain cameras, that

fact actually supports the Company's position on review. The Company's security officers are not required to do such work because the Surveillance Technicians are, in essence, de facto members of the Security Department who ensure that the Security Department's system is adequate to provide security at the property. Tr. 156-162; 221-23.

As the Vice President of Security explained, when his department was charged with developing and implementing a surveillance and alarm scheme for Tessorini, which is Bellagio's fine jewelry boutique, the Surveillance Technicians had exclusive responsibility for that work. Tr. 166-69; ERX 6.

The Surveillance Technicians' responsibility for the Security Department CCTV and access control systems is equivalent to their responsibility for the surveillance system. Tr. 164-65. For that reason, for all practical purposes, they function like members of the Security Department and are certainly considered to be an integral part of the property wide security scheme. They work in the Security Department monitor room each day for hours at a time. Tr. 155-160.

In addition to this technical support, the Surveillance Technicians also perform front line security functions. The Security Department's nine investigators rely heavily on video surveillance, and the only employees who can manufacture and install covert surveillance devices that are used to investigate employee misconduct. Tr. 171-184. As the Vice President of Security explained, his team uses Surveillance Technicians regularly to conduct investigations of the front desk, to conduct "integrity checks" and to investigate allegations of theft and sleeping. *Id.*; ERX 7. In each case, the Security Department depends on the Surveillance Technicians to keep the investigation confidential and not disclose the locked out cameras or covertly installed cameras to the individuals under investigation. *Id.* The investigations result in terminations. *Id.*

Finally, the Vice President of Security explained that Surveillance Technicians would be an essential group if he was to prepare a strike plan. Tr. 187-191. He testified that when there are protests and demonstrations around the perimeter of the property, he contacts Surveillance Technicians to confirm camera coverage, and in some cases, would require them to install new cameras to ensure adequate observation of perimeter areas. *Id.*

V. RESPONDENT'S REQUEST FOR REVIEW SHOULD BE GRANTED. THE REGIONAL DIRECTOR SHOULD HAVE DISMISSED THE PETITION BECAUSE THE SURVEILLANCE TECHNICIANS ARE GUARDS UNDER SECTION 9(b)(3) AND BECAUSE THEY HAVE "CONFIDENTIAL" STATUS UNDER BOARD PRECEDENT.

A. The Surveillance Technicians Are Guards Within The Meaning Of Section 9(b)(3) And The Regional Director Was Therefore Barred From Issuing A Decision And Direction of Election.

1. The undisputed evidence establishes that the Surveillance Technicians are "employed … to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises."

The Regional Director's conclusion that Respondent failed to show that Surveillance Technicians enforce rules to protect property from employees or patrons is wrong and reflects a myopic understanding of the facts. DDE at 8-9. The undisputed evidence establishes the Surveillance Technicians are the modern evolution of the plant guard. The modern hotel casino cannot be secured from both its employees and outsiders without utilizing electronic surveillance and alarm systems. Indeed, Gaming Control Regulations recognize this necessity and mandate that Respondent maintain a sophisticated surveillance system with approved camera coverage in gaming areas. As the Vice President of Security explained, the Security Department relies on CCTV systems to an even greater degree. Uniformed guards and men walking on the catwalks with binoculars have been replaced by hundreds of sophisticated cameras. To secure property, including cash, the jewelry contained within the Company's high-end Watch Boutique, and

gaming chips, the company uses both alarms and electronic doors. The casino cage, the soft count room, surveillance offices, executive offices, and jewelry store are secured with these alarms and doors.

The Surveillance Technicians are the custodians of these systems. They are totally indispensable. There are as responsible for and as intimately involved in protecting property and people on the premises as the surveillance operators and the security officers. They are an extension of those employees, and they work with them hand in hand, every day, all day long. Neither the Surveillance nor the Security Department can operate without them. The Regional Director ignored these facts and dismissed the essential nature of the Surveillance Technicians' work without consideration of the context created by their employment in the modern casino hotel. The Las Vegas casino business is like no other. To operate and protect the integrity of the hotel-casino, it must have electronic surveillance. To maintain CCTV surveillance, the Company must have Surveillance Technicians. They are as important to the security operation as any individual security officer.

As noted above, the Board considered a similar situation almost thirty years ago in *MGM Grand Hotel*, 274 NLRB 139 (1985). In that case, the Board heard a petition by the International Union of Operating Engineers to represent technical employees who operated and monitored an automated life-safety fire alarm system. Like the Surveillance Technicians in this case, the employees were responsible for installing, maintaining and monitoring the integrity of the system. "The operators performed no physical duties in rectifying the alarm or abnormal situations." 274 NLRB at 139.

The Board held that the systems operators were guards within the meaning of section 9(b)(3). It said:

> Contrary to the Regional Director, the foregoing facts and the record as a whole show that the J.C.-80 operators are intimately involved in the security functions and life-safety procedures at the Employer's establishment. This Employer has installed a vastly sophisticated life-safety system, encompassing myriad functions. While the system operates primarily for fire detection, it performs significant security functions. That the operators spend only a portion of their time monitoring such functions is immaterial in determining their status as guards under the Act. The operators of the J.C.-80 system, which falls within the jurisdiction of the security department, serve to monitor and report possible security problems and infractions and possible life-endangering situations. Employees performing similar functions have been found to be guards under the Act. The operators of the Employer's system are as closely involved in protecting the Employer's property and enforcing security as are Employer's plainclothes officers and uniformed guards. In light of the above we find, contrary to the Regional Director, that these operators are guards under Section 9(b)(3) of the Act. We also find that these operators do not share a community of interest apart from the rest of the security department. Further, as we have found these employees to be guards, we also find that the Petitioner is barred from being certified as their representative. Inasmuch as there is nothing in the Act that warrants the use of Board resources to resolve a question concerning representation raised by a labor organization which cannot be certified, we will dismiss the instant petition

Id.

Applying the same analysis to this case requires the same result. The Surveillance Technicians are intimately involved in security and surveillance operations. Any distinction between the role of an officer who utilizes the CCTV system to observe, and the role of the Surveillance Technician who designs, installs, maintains the integrity, of and controls the access to, is artificial. One employee cannot both monitor and maintain the integrity of the system, but it is a joint enterprise. One cannot be a guard while the other is not. And, indeed, there is no difference between the Surveillance Technicians' role as an electronic gatekeeper for the CCTV and access control systems, and the role of a security officer posted at an employee entrance.

Both individuals guard access to a critical area. Both individuals police the use of Company property.

Although they do not patrol like security officers, the record contains a significant amount of undisputed evidence establishing that they play a direct role in enforcing rules and protecting property. Both the Surveillance and Security Department rely upon Surveillance Technicians to conduct confidential investigations. They are responsible for controlling electronic access to the CCTV and access control systems. *MGM Grand Hotel* was similar. In that case, MGM Grand could not protect and secure its property without the JC80. The Company relied upon the technicians to monitor the integrity of the system. That was thirty years ago. Today, the Company literally cannot operate without surveillance – it violates gaming control – nor can it secure its property and patrons without electronic surveillance. The surveillance techs are the custodians of that system. They are indispensable to both functions. The principles in *MGM Grand Hotel* require application of 9(b)(3) in this case.

The board has utilized similar rationales for dispatchers and other kinds of employees who have far less importance to protecting an employers' property than the Surveillance Technicians. For example, in *PECO Energy Co.*, 322 NLRB 1074, 1083 (1997), the Board found that a janitor who performed cleaning and maintenance work could be considered a guard because the employer assigned him additional security related duties. In *Allen Services Co.*, 314 NLRB 1060, 1062 (1994), the Board held that employees whose primary responsibility was enforcement of the employer's rules in protecting the safety of railroad equipment – like the Surveillance Technicians responsibility for protecting surveillance equipment – were "guards" despite the fact that they did not wear uniforms, did not carry firearms, had no "guard" training and were not required to confront trespassers.

In *Rhode Island Hospital,* 313 NLRB 343, 346-47 (1993), security dispatchers were also determined to be guards because even though they did not actually respond to such situations or personally confront employees or others because their conduct in observing and reporting infractions was "an essential link in the Hospital's effort to safeguard its employees and enforce its rules." In *Wells Fargo Alarm Services*, 289 NLRB 562, 563 (1988), the Board found that service technicians whose primary responsibility was repairing and servicing various security systems were guards because some of their time was spent notifying the police that an alarm had been triggered and because, from time to time, they would inspect an alarm after the police had been notified. *See also Local 3, Int'l Brotherhood of Electrical Workers v. NLRB*, 1987 U.S. Dist. LEXIS 6577 (S.D.N.Y. July 22, 1987) (finding that electronic technicians are guards within the meaning of the Act as they are responsible for a fire management safety system and notify and assist the appropriate authorities in the event of a problem).

Finally, the Board has consistently recognized that application of the Act in the modern economy requires certain Board policies and doctrines to be reconsidered. For example, in *Purple Communications*, 361 NLRB No. 126 (Dec. 11, 2014), the Board recognized the centralized role that technology and electronic computer use possess in today's workplace and found that employees, in appropriate circumstances, may be entitled to use their employer's email communication systems to engage in protected concerted activity. Surveillance Technicians are not plumbers or tradesmen. They are critical members of the Company's security team, and the evolving nature of the contemporary casino and electronic surveillance requires the Board to consider this context in determining what constitutes a "guard" under the Act.

The evidence in this case is undisputed. The Surveillance Technicians enable Bellagio to conduct security and surveillance activity. They secure electronic systems and are responsible for preventing and identifying misuse in the same way that a traditional door guard secures an exterior access point. Applying the same principles articulated in *Purple Communications* – that the Act must be adapted – to this case mandates a finding that the Surveillance Technicians are guards. Failing to apply the 9(b)(3) on the facts in this case would be an affirmation of the antiquated views that the Board has consistently refused to enforce in other contexts.

2. The undisputed evidence also establishes that permitting the Petitioner to represent the Surveillance Technicians would subject those employees to an unconscionable conflict of interest.

The Regional Director also erred because he failed to consider the potential conflict of interest that certification of the petitioned for unit would create. Although Board law is clear that guard determinations under Section 9(b)(3) depend upon the existence of this conflict of interest, the Regional Director inexcusably ignored it. If had applied the law correctly, he likely would have reached the result urged in this request for review. The undisputed evidence shows that the Surveillance Technicians would be compromised by an overwhelming conflict of interest if they were represented by a non-guard union like the Petitioner.

A determination of guard status depends upon the totality of the circumstances. However, in making such a determination, the Board's primary focus has been on whether the employee's responsibilities to the employer could interfere with their duty of loyalty to a union or fellow union members, not whether the individual employee carries a gun or places suspected wrongdoers in chokeholds. The Board has used the legislative policy of avoiding the potential conflict of dividing loyalties in any employee "obligated to enforce plant protection rules against employees and other persons" to make such decisions. *See Wells Fargo Alarm Services v.*

NLRB, 533 F.2d 121, 125 (3rd Cir. 1976) (*citing Unites States Gypsum Co.*, 152 NLRB 624, 627-28 (1965)); *see also Lion Country Safari*, 225 NLRB 969, 970 (1976). Often, the Board's decisions have been motivated by the goal to insure an employer that he would have a core of plant protection employees, during a period of unrest and strikes. *Id.* In application, this principle has meant that an employee is a "guard," regardless of his or her title or position, if in discharging his security or safety related job duties, the employee could be faced with potential conflicting loyalties between the duty of loyalty he or she owes to perform his responsibilities to the employer and the duty of loyalty owed to fellow union members. *Id.*

The potential for conflict in this situation is self-evident. Any action the surveillance techs take with respect to the electronic surveillance systems creates a ripple effect which could, in some cases, require the employer to cease transacting business because it falls out of regulatory compliance. In practice, and as was conceded, the Surveillance Technicians can lock any member of the Company out of the system, eliminating the person's access, or even completely shutting the entire system down and thereby deny the entire hotel casino access to the CCTV system and all electronic access control. Their ability to change, modify, and control the Company's security systems is comparable to the ability of a super thief in a science fiction movie: the Surveillance Technicians are responsible for everything related to electronic security, and there is literally nothing that they cannot do.

Another fact that the Regional Director failed to consider is the Surveillance Technicians' involvement in strike planning. The evidence is undisputed that they would be critical members of the Security Department's efforts to plan for a work stoppage or potential strike related picketing and protesting. Tr. 200-206; 215-16. As someone with experience with the most comprehensive work stoppage that the Las Vegas Strip has seen, he explained, the CCTV system

is a critical component of his ability to observe and secure the perimeter and interior areas of the property. *Id.* Surveillance Technicians would be used to add cameras in the event doing so was necessary to provide proper observation, ensure that cameras were fixed if they were disabled, and ensure that cameras properly recorded any misconduct or interference with patrons. *Id.* No one in the Security Department can perform such work.

If Surveillance Technicians were permitted to be members of a non-guard unit, it would therefore compromise the ability of the Company to secure its property during the strike, and would also subject the Surveillance Technician to an extraordinary conflict of interest in the event members of his non-guard unit engaged in potential misconduct when the Surveillance Technician had the ability to prevent the Company from detecting the misconduct or erasing evidence of it. *Id.*

B. Even If The Surveillance Technicians Cannot Be Considered Guards, Their Unique Status Nonetheless Requires That They Be Considered Confidential Employees Under The Act.

The Regional Director's DDE requires review because he failed to apply the confidential employee exemption set forth in *NLRB v. Hendricks County Rural Elec.*, 454 U.S. 170 (1981). In *Hendricks County*, the Supreme Court affirmed the Board's policy of refusing to certify bargaining units which contained employees who act in a confidential capacity to persons who exercise managerial functions in the field of labor relations. *Id.* As the Board has since explained, employees who are directly and inextricably involved in the Company's efforts to investigate potential employee misconduct and adjust grievances related to such matters will often be deemed confidential employees so long as the employees also have access to or possession of confidential labor relations information. *Id.* at 191.

The Regional Director found that the Surveillance Technicians had unparalleled access to confidential information, including confidential labor relations information. DDE at 7-8. Nonetheless he asserts that the Company failed to demonstrate a nexus between this access to confidential information and labor relations. *Id.* This conclusion was wrong.

Surveillance Technicians have a direct role in devising and implementing surveillance coverage, as well as devising and implementing all of the systems used to manage employee access to surveillance. They know, more than any other employee on property, which areas are monitored, how they can be compromised, and whether they are vulnerable to electronic or physical intrusion. Although the Surveillance Technicians merely have access to confidential bargaining and negotiation information – access which cannot be limited or monitored due to their administrative rights over the CCTV and access control systems – that does not disqualify them from having confidential status under the Act because it is also quite clear that the Company relies on the Surveillance Technicians for their unique understanding of the property's vulnerabilities when making decisions about how employees, specifically dealers and other gaming employees will be monitored.

For both of these reasons, the Regional Director's citations to *Firestone Synthetic Latex Co.*, 201 NLRB 347, 348 (1973) and *Bakersfield Californian*, 316 NLRB 1211, 1212-13 (1995) is misplaced. Those cases recognize that when labor relations executives rely upon employees like the Surveillance Technicians who have access to confidential information, such as labor strategy notes, or as in this case, strike planning information, and who also assist members of human resources with investigations and other labor relations matters, those individuals can be considered to possess confidential status. Contrary to the Regional Director, the record establishes that the Surveillance Technicians play an integral role in misconduct investigations.

They general know the identity of the individuals who are subject to investigation and also know the areas where investigations will take place. Allowing individuals who have such knowledge to be in the position of disclosing would violate the principles articulated in *Hendricks County Rural Electric*, 454 U.S. at 172 and 190.

Finally, the Surveillance Technicians' unique status and authorities must be taken into consideration. They are not like other employees, such as certain kinds of clerical or administrative personnel, who have been found to fall outside the confidential employee exception's coverage. The Surveillance Technicians cannot only access sensitive labor relations and other information that would not ordinarily be subject to disclosure; they can also erase any trace of their efforts to utilize such access. The facts of this case warrant reconsideration of existing Board precedent.

VI. CONCLUSION

For the reasons set forth above, the Board should grant the Bellagio's request for review and dismiss the Petition.

Dated this 14th day of July, 2015.

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BELLAGIO, LLC **Employer,** **and** **INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501,** **Petitioner.**	**Case No. 28-RC-154081**

CERTIFICATE OF SERVICE

In addition to filing this Request for Review via the NLRB's electronic filing system, we hereby certify that copies have been served this 14th day of July, 2015, by email upon:

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